

ESTTA Tracking number: **ESTTA455271**

Filing date: **02/08/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85267214
Applicant	Arthur M Kurek
Applied for Mark	DON'T CARE SPORTS WEAR
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Submission	Reply Brief
Attachments	Kurek Reply Brief.pdf (5 pages)(52257 bytes)
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Serial No. 85267214

Mark: DON'T CARE SPORTS WEAR

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EX PARTE APPEAL

APPLICANT'S REPLY BRIEF

PRELIMINARY

This Reply Brief is limited in scope to briefly setting forth the Applicant's responses to several arguments made [or not made] by the Examining Attorney

ARGUMENT

1. *At Section A of her Argument, the Examining Attorney argues that Polumbo's mark and the Applicant's mark "share the similar dominant features of rhyming negative terminology and, when viewed in their entirety, create overall similar impressions."*

While it is true that the marks share negative terminology and rhyming words, the dominant aspect of Polumbo's mark is the first word [or, really, abbreviation] "IDC." This is the very first "word" of the mark, and it sets this mark off from all other brands, whether trademarked or not. Therefore, despite the similar aspects of the two marks, a consumer shopping for IDC I DON'T CARE WEAR goods can not miss the absence of "IDC" at the very beginning of the brand name. This is important because it makes it improbable that the consumer will be confused, and that is the standard under In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 1361-62 (C.C.P.A. 1973).

2. *Similarly, At Section A of her Argument, the Examining Attorney argues that, "In contrast to applicant's brief (page 4), the shopper is unlikely ever to see these two marks together. The average consumer probably is disinclined to compare number of syllables and lacks the opportunity for the subtle analyses discussed in applicant's arguments (pages 5-6), especially amid the bustle of a lively, crowded mall or department store. Instead, the consumer is most likely to remember "don't care...wear", the negative rhyme featured in both marks.*

Of course the "average consumer" is not going to write out the marks side by side for an in depth analysis of the number of syllables and other aspects of the trademarks. This argument could be made in every response to every Ex Parte Appeal for refusal to register. Nonetheless, this is precisely the type of analysis engaged in by this Board and our Courts [not to mention Applicants and Examining Attorneys] in determining whether it is appropriate to register and/or protect a particular mark.

We all examine every aspect of the marks in an attempt to predict whether it is probable that the public will confuse the marks in their daily life. Where a consumer is not looking for a particular brand, the mark is irrelevant. However, for all of the reasons stated herein, and in our initial Brief, it is unlikely

that a consumer looking for Polumbo's goods will confuse them with the Applicant's.

3. *Similarly, At Section A of her Argument, the Examining Attorney states that, "Applicant argues that the owner of the cited registration has abandoned its trademark due to the supposes nonuse online (Applicant's brief, page 6). However, this argument is not persuasive since not all businesses are online.*

First, this misstates that section of our argument, which was actually based on the second factor (regarding similarity) often considered by the Courts, the strength or fame of the mark, i.e. commercial strength or marketplace recognition of the mark. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 1361 (C.C.P.A. 1973); A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc., 237 F.3d 198, 211, 221 (3rd Cir. 2000). See page 6 or our Brief.

While all businesses do not have their own websites or actively sell their products online, virtually every brand with any significant market activity will turn up in Google, Yahoo and Dogpile searches. The search "hits" may refer to reviews of the product, comments about the product, places [other than the mark holder] to purchase the product, etc. The absence of a single substantive hit for the mark or product reflects its extraordinarily weak or nonexistent market strength.

4. *The Examining Attorney's Brief does not address the "sound" of the marks.*

The Examining Attorney ignores what may be the Applicant's strongest argument - when spoken out loud the marks sound so different, and leave such a different impression, that they cannot possibly be confused. (See discussion at page 5 of Applicant's Brief). As we did in our initial Brief, we invite the Board to say each mark out loud. Polumbo's mark is almost twice as long when spoken out loud, and takes twice as long to say. Moreover, it begins with an abbreviation that makes it sound choppy and aggressive. By contrast, the Applicant's mark has a smooth and soothing sound.

CONCLUSION

For all of the foregoing reasons, the refusal to register the Applicant's mark should be reversed.

Dated this 8th day of February, 2012

Respectfully submitted,

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